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NO. 80-

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ALTON & SOUTHERN RAILWAY COMPANY
A CORPORATION,

Petitioner,

vs.

ULECIOUS BUCHANAN,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIFTH DISTRICT

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QUESTIONS PRESENTED

Whether the trial court abused its broad discretion in granting Plaintiff a new trial in this cause, and whether the unanimous Appellate Court of Illinois, Fifth District and the Supreme Court of Illinois erred in affirming said new trial.

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REASON FOR DENYING THE WRIT OF CERTIORARI

THE TRIAL COURT DID NOT ABUSE ITS BROAD DISCRETION IN GRANTING PLAINTIFF A NEW TRIAL AS UNANIMOUSLY AFFIRMED BY THE ILLINOIS APPELLATE COURT, FIFTH DISTRICT AND THE SUPREME COURT OF ILLINOIS

United States Supreme Court Rule 17, 28 U.S.C.A. lists the "Considerations governing Writ of Certiorari" considered by the Supreme Court in determining whether to grant a Petition for a Writ of Certiorari.

While Respondent does not intend to demean the Petition filed herein, it must be noted that the issue before this Court is hardly one of first impression. The Appellate Court of Illinois, Fifth District, was not overwhelmed by the "issues" raised below as evidenced by its "Finding that a published opinion in this case would have no precedential value... ." (A8)

Indeed it is not entirely clear that the Illinois Appellate Court's affirmance of the trial court's granting of a new trial was properly before the State Supreme Court much less the Supreme Court of the United States.

Kavanaugh vs. Washburn, 387 Ill.204, ___, 56 N.E.2d 420, 423 (1944) held that no authority warranted the right of a party to appeal to the State Supreme Court "...from an Order of the Appellate Court entered in that court on a review of an order granting a new trial." For this reason alone, Respondent would be remiss if he did not move that the Petition for Writ of Certiorari filed herein be dismissed.

Allowing without admitting the jurisdiction of this Court, Respondent submits that there is no "...special and important reason..." (U.S.Sup.Ct. Rule 17, 28 U.S.C.A.) for granting the Writ requested by Petitioner. The Petition should be denied.

The trial judge's exercise of discretion in granting a new trial after the admission of prejudicial testimony is a discretionary determination to which the reviewing court should defer since the trial judge is in a better position to observe the prejudicial testimony and its effect on the jury. This case presents no exception to that well-settled precept, nor is there any record of any abause of the trial judge's discretion which is the only basis for upsetting the granting of a new trial. It is equally well settled that ordinarily an Appellate Court will not review

an order granting a new trial unless there is a showing that the trial court clearly and palpably abused its discretion. Therein lies the sole issue before this court as determined by the Illinois Appellate Court, Fifth District (Appendix A to Petition, Order of the Court page 8) and approved by the Illinois Supreme Court.

As set out in **Keen vs. Davis,** 108 Ill.App.2d 55, 245 N.E.2d 467 (5th Dist., 1969), relied upon by Petitioner below but abandoned herein, in reviewing whether the trial court is justified in granting a new trial, the reviewing court's inquiry is limited to whether the trial court's action was an abuse of discretion. The court in **Keen** provides a definition of abuse of discretion by citing

> ...**Peek vs. United States,** 9 Cir., 321 F.2d 934, where quoting from **Delno vs. Market St., Ry. Co.,** 124 F.2d 965, the United States Court of Appeals for the Ninth Circuit, at page 942, said that discretionary judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only when no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken

> by the trial court, then it cannot be said that the trial court abused its discretion."
>
> 246 N.E.2d at 471.

It can hardly honestly be asserted in this case that, "...no reasonable man would take the view adopted by the trial court." Quite obviously "...reasonable men could [and in this case do] differ as to the propriety of the action taken by the trial court..."; therefore "...it cannot be said that the trial court abused its discretion."

In applying the definition of abuse herein cited, the **Keen** opinion concludes:

> Applying this definition although we do not agree with the trial court that the evidentiary situation presented required the granting of a new trial, we are governed by **Dept. of Public Works & Bldgs. vs. Russell**, 28 Ill.2d 491, 192 N.E.2d 900, wherein the Supreme Court said at page 496, 129 N.E.2d at page 903: "The issue, as we have suggested, is not whether we would set aside the verdicts upon the record before us. It is rather whether the record shows that the trial judge abused his discretion in granting a new trial," and we are unable to say that the trial court, in granting defendants a new

> trial, abused its discretion. Id.

It must finally be noted that **Keen** affirmed the trial court's granting of a new trial as did the Fifth Judicial District and the Supreme Court of Illinois in the case before this Honorable Court.

Klatt vs. Commonwealth Edison Company, 33 Ill.2d 41, 211 N.E.2d 720 (1965) held the Appellate Court erred in reversing the trial court's order granting a new trial; the reversed Appellate opinion was relied upon by Petitioner below but abandoned herein. In reversing the Appellate Court, the Illinois Supreme Court said:

> Moreover, it must be remembered that the trial court, in reaching a determination to award a new trial, is vested with discretion, and absent a clear abuse thereof, its decision should not be disturbed on appeal (**Dept. of Public Works & Bldgs. vs. Russell,** 28 Ill.2d 491, 192 N.E.2d 900; **In re Estate of Velie,** 318 Ill.App. 550, 48 N.E.2d 431.) We therefore hold that the Appellate Court erred in reversing the trial court's order of granting defendants a new trial.
>
> 211 N.E.2d at 727.

Defendant-Petitioner suggests to this Honorable Court that the large, black, be-

wigged individual in question was "... the person believed by Petitioner to have brought Respondent to work shortly before," (Petition for a Writ of Certiorari, page 8). Unfortunately no specific line of questioning to support said "belief" was ever pursued by defense counsel. Even more unfortunately, the more obvious belief to be drawn from the testimony of Defendant's surprise witness is that Mr. Buchanan was involved in somewhat seamy relationships with rather unsavory characters. Said inference was noted by defense counsel: "Now we have a red-headed fag driving him to work." (R 172 E) It was also clear to the court: "If he's running around with a fag with a red-haired wig on..." (R 172 I).

Defendant cannot deny its knowledge of the prejudicial impact this wholly unrelated testimony would have on the jury: "Mr. Gunn: 'I didn't know about the red-haired wig part or know the strange impact of his testimony until I talked with him.'" (R 172 H).

It was quite clear to the trial judge, and to the three Appellate Judges who affirmed his decision, and evidently to the Illinois Supreme Court that the damaging inference raised by Mr. Korando did not deal with how

Plaintiff got to work on the morning in question, but only acted to raise the inescapable inference of black homosexuality. Moreover the comments of counsel for the Plaintiff and the Defendant and the comments of the trial judge as noted herein belie Defendant's contention both here and at the State Appellate levels "...that the suggested inference of black homosexuality...was solely a figment of the imagination of Respondent's attorney..." (Petition, page 9).

The concern of Plaintiff's counsel with the irrelevance and prejudice of the proposed testimony was articulated to defense counsel and the court: "It doesn't give you the right to cloud this thing and drag it out in front of a jury." (R 172 E). Plaintiff's counsel also expressed concern with "...the effect that the testimony would have on the jury... ." (R 172 A). While the particular adjective "prejudicial" may not have been articulated to describe the "effect" which concerned Plaintiff's counsel, the thrust of the objection in context with the circumstances surrounding it is quite obvious.

Upon assurance by defense counsel that the testimony of Mr. Korando would explain Plaintiff's arriving at work in a fashion other than that testified to by Plaintiff

thereby impeaching him, the court allowed the Defendant to call Mr. Korando who was an undisclosed witness until called to the stand (R 172 H). Defense counsel expressly advised the court: "...I'm talking about how the guy got there and there is a witness that may not be produced but it is in direct conflict with what the Plaintiff says." (R 172 D). "Mr. Gunn: '...I found out yesterday that this foreman saw him arrive at work and there was somebody in the car that led him out.'" (R 172 G) No such testimony, however, was presented.

Based on the express representations of defense counsel, the court concludes that: "It seems to me that while the question of how he got to work or who brought him to work may not under ordinary circumstances be relevant or material, that we have a situation here where there is a complete conflict..." (R 172 G) As already discussed, however, the record is totally void of any testimony or reference to the alleged conflict concerning Plaintiff's arrival at work.

Respondent is not suggesting that Defendant intentionally misled the court. It is clear, however, to this writer, and evidentaly to the trial judge, and the Appellate Court, and the Illinois Supreme Court that

the only testimony developed from Defendant's last-minute witness was wholly irrelevant and unfairly prejudicial. Reference, in defense counsel's own words, to "...this thing in the car..." (R 172 B) with no testimony concerning Plaintiff's means of arriving at work on the date in question or activities of the preceding evening was prejudice which far outweighed the very nominal probative value, if any, of that testimony elicited from Mr. Korando. At no time was there any mention that the "...red-headed fag..." (R 172 E) drove Plaintiff to work on the morning in question or was with Plaintiff during the evening before.

The unfair and extremely prejudicial implications of the testimony elicited from Mr. Korando became evident to the court only after putting the entire testimony into perspective, and quite clearly justifies the granting of a new trial in this cause.

> The purpose of vesting the trial judge with power to grant a new trial is to permit him, before losing jurisdiction of the case, to correct errors that he or the jury might have made during the course of the trial. Courts of review have repeatedly stated that they will not disturb the decision of a trial court on a motion

> for a new trial unless a clear abuse of discretion is affirmatively shown. The reason for this rule is that the trial court has had the opportunity to consider the conduct of the trial as a whole, and therefore is in a superior position to consider the effects of errors which occurred, the fairness of the trial to all parties, and whether substantial justice was accomplished. **Duff vs. Ewing,** 65 Ill.App.2d 382, 208 N.E.2d 320. Greater latitude is allowed a trial court in granting a new trial than in denying a new trial. **Hollis vs. Mateika,** 65 Ill.App.2d 267, 213 N.E.2d 409.
>
> **Magnani vs. Trogi,** 70 Ill.App.2d 216, _____, 218 N.E.2d 21, 23-24 (2d Dist., 1966), cited at page 5 of the Order of the Appellate Court of Illinois, (A-5).

It hardly can be honestly claimed that "a clear abuse of discretion" has been shown in this cause. The case at bar is no exception to the well-settled law in this regard, and the circumstances quite clearly justify the trial judge's final decision. It is difficult enough for a large, black man seeking money damages to prevail in Madison County, Illinois without interjecting the additional inescapable bias developed as a

result of Mr. Korando's wholly irrelevant testimony.

A recent case which seems to accurately summarize the law and issues regarding the granting of a new trial and the expected Petition for Leave to Appeal is **Mitchell vs. Sims**, 62 Ill.App.3d 514 at ____, 19 Ill.Dec. 600 at ____, 379 N.E.2d 115 at 116 (1st Dist., 5th Div., 1978):

> It is a well-established rule that the decision to grant a new trial is an exercise of the trial court's discretion which should not be reversed on appeal unless a clear abuse of discretion is shown. (**Ervin vs. Sears, Roebuck & Co.** (1976), 65 Ill.App.2d 140, 2 Ill.Dec. 333, 357 N.E.2d 500; **Klatt vs. Commonwealth Edison** (1965) 33 Ill.2d 481, 211 N.E.2d 720) ...Most importantly for the purposes of this appeal, it is clear that the trial court's order granting a new trial will only be disturbed when the alleged abuse of discretion is affirmatively shown in the record. (Citing cases)

No such affirmative showing appears in this record, and the teaching of the court relative to an Illinois Supreme Court Rule 306 Petition applied *a fortiori* to a Supreme Court Rule 315 Petition which was denied

in this case, presuming such a Petition is proper where the Appellate Court has affirmed the trial court's granting a new trial. (**Kavanaugh vs. Washburn, supra.**)

The law concerning the wide latitude afforded the trial judge in granting or denying a new trial is too rudimentary to be challenged. The axiomatic law as applied to the facts of this case demonstrates that the trial judge in no way abused the broad discretion afforded him in determining whether or not to grant a new trial.

Concededly no in-court objection was raised to testimony which Plaintiff knew would be allowed despite his protestations before the jury. A party is not obligated to highlight prejudicial testimony by objecting to it, especially when the party knows in advance that objections will be overruled. It has been recognized that, in the minds of the jury, objections may only act to emphasize prejudicial material. See, for example, **Roehrig vs. Dept. of Public Works,** 45 Ill.App.3d 189, 3 Ill.Dec. 893, 359 N.E.2d 752 at 760 (5th Dist., 1977) where, in discussing the purpose of moving for a Motion in Limine, the court recognizes that such a motion "...is an implicit state-

ment that the movant believes he will suffer prejudice if he has to object to the evidence before the jury."

The prejudicial remarks elicited were calculated to and did have their intended detrimental effect. Objection would only have accentuated that effect which was further exploited by Defendant in suggesting to the jury that the prejudicial testimony was somehow condoned by the court:

> Mr. Gunn: ...I can only say to you that we play by the rules, in this court, and, if it wasn't relevant, in some fashion, it wouldn't be in front of you, as a piece of evidence to consider. So, there has to be some relevancy to it, and what relevancy is for you to decide. (R 421)

Defendant would have the court believe that Plaintiff stood mute while the tendered testimony was being discussed in chambers. To the contrary, however, Plaintiff on several occasions objected to the testimony of Mr. Korando on the bases of surprise and irrelevance which cannot be detached from the inherent objection of prejudice, in that any evidence must have its prejudicial effect weighed against its probative value, if any. At any rate, Plaintiff's objections were all

to no avail since the court was led to believe that Defendant would tie in the evidence which the court would find "...not under ordinary circumstances [to] be relevant or material..." (R 172 G). As has already been set out herein, no such "tie-in" was accomplished, aside from interjecting inflammatory innuendos.

As noted in **Johnson vs. Bennett**, 395 Ill.389 at ____, 69 N.E.2d 899 at 903 (1946), a will contest cited by Defendant at page 11 of its Petition,

> ...a specific objection to the admission of evidence is unnecessary where it is manifest that the offered proof has no probative value whatever.

This well-settled proposition is succinctly reiterated in Hunter's **Trial Handbook** at Section 33:12, page 320:

> ...evidence which will only serve to prejudice the minds of the jury is properly excluded. In weighing the tendency to produce passion and prejudice out of proportion to its probative value, the matter is largely within the sound discretion of the trial court. 29 **Am.Jur.2d**, Evidence Section 260.

See also **1 Wigmore on Evidence**, Section

18 (3d Ed. 1940) cited at pages 6 through 7 of the Order of the Appellate Court of Illinois. (A 6-7)

The prejudicial effect and irrelevance of the proferred testimony was repeatedly expressed to the court in chambers (R 172 A, 172 E, 172 I) but unfortunately was not properly ruled upon until the wholly irrelevant and prejudicial testimony had taken its toll. Thus without going into any allegedly "impeaching" testimony, Defendant presented to the jury Mr. Korando's testimony concerning

> ...one individual...colored, approximately forty-five years old. Now, I'm not really sure whether it was male or female, to be very honest with you...he had a wig on, a real dark red wig, but in size he was in excess of 230 pounds, approximately six foot two, six foot three... (R 192-193).

In relation to Mr. Buchanan, Mr. Korando allegedly observed

> ...his eyes were extremely red, and I could tell, with what he said to me, he really extremely overemphasized, you know, his feelings. (R 194)

Mr. Korando finally warned Mr. Buchanan's foreman:

> "You may have some trouble with him, I don't know." I just said, "You may have some trouble with him." I didn't get specific. (R 194)

None of the foregoing had any bearing on any legitimate issue at trial. More importantly the demeanor of the witness and the impact of his testimony on the jury cannot be accurately conveyed in writing but were available to be observed by the trial judge.

It might also be noted that the trial judge who heard this cause was hardly an inexperienced novice. Then Illinois Circuit Judge William L. Beatty, now District Judge Beatty for the U. S. District Court, Southern District of Illinois, is a seasoned trial judge who had the benefit of considerable trial experience as an attorney before assuming his responsibilities on the bench.

It is patently unfair to even suggest that the Honorable Judge Beatty would "...persistently deprive litigants of their right to a jury determination." (Petition, page 12, citing **Rogers vs. Missouri Pacific Railroad Co.**, 352 U.S. 500, 510, 77 S.Ct. 443, ____, 1 L.Ed.2d 493, 502 (1956)) While Plaintiff-Respondent certainly agrees that persistent deprivation of the right to trial

by jury warrants the intervention of the Supreme Court of the United States, the circumstances of this case do not justify imposing upon this Honorable Court.

The impact of the testimony in question was ultimately noted by the trial judge and handily disposed of by the Appellate Court: "However, the testimony in question is both highly prejudicial and immaterial to any issue in the case." (Appellate Court Order, page 7, A-7) The opinion of the Appellate Court, as affirmed by the State Supreme Court, is in stark contrast to Petitioner's convenient characterization of the comments in question as "entirely harmless." (Petition, page 8)

Defendant seems to suggest that a party is somehow required to move for mistrial in order that grounds for a new trial be properly preserved. No such requirement, however, is imposed upon any party, and Defendant does not cite the Court to any rule of procedure or case law so stating.

In **Torrez vs. Raag**, 43 Ill.App.3d 779, 2 Ill.Dec. 465, 357 N.E.2d 632 at 635 (2nd Dist., 2d Div., 1976) cited by the Illinois Appellate Court at page 5 of its Order (A-7), the court dealt with failure

to move for a mistrial as follows:

> We do not feel the plaintiff's failure to move for a mistrial renders her unable to cite the prejudicial remark as a ground for a new trial. In ruling on the motion for a new trial, the court found this remark to have had a prejudicial effect on the jury. The trial court is in a better position than the reviewing court to determine the prejudicial effect, if any, of a remark made during argument, and unless clearly an abuse of discretion, its ruling should be upheld. **Elizer vs. Louisville N.R. Co.** (1970) 128 Ill.App.2d 249, 254, 261 N.E.2d 827; **Chicago vs. Chicago Title and Trust Company,** 331 Ill.322, 163 N.E.2d 17.

The ultimate issue in **Torrez** was the trial court's granting Plaintiff a new trial in a medical malpractice case after a verdict in favor of the Defendant physician. The Appellate Court held that the trial court did not abuse its discretion in ordering a new trial; the court concludes:

> ...and we therefore do not find that the court abused its discretion in ordering a new trial since there was a showing that the verdict, though perhaps not wholly

> unwarranted by the evidence, resulted from passion or prejudice. We therefore affirm the order of the trial court granting a new trial of this cause.
> Id.

The same sound reasoning applies to the facts of this case as unanimously held by the Appellate Court, Fifth District, and affirmed by the Illinois Supreme Court.

Aside from the fact that timely and proper objections were made by the Plaintiff in this cause, the Appellate Court

> "...may consider...assignment of error even though no objection was made and no ruling was made or preserved thereupon by court or counsel. (**Belfield vs. Coop** (1956), 8 Ill.2d 293, 311-313, 134 N.E.2d 249, 259; **Paulsen vs. Gateway Transportation Company** (2d Dist., 1969), 114 Ill.App.2d 241, 252 N.E.2d 406.)"

> **Manninger vs. Chicago and Northwestern Transportation Company**, 6 Ill.App.3d 719 (5th Dist., 1978).

In **Manninger** the court specifically noted that counsel wholly failed to object to many of the statements urged as grounds for reversal.

It must finally be noted that a party seeking a new trial is not put to the in-

surmountable burden that Petitioner would lead this Court to believe Plaintiff must somehow sustain. **Heaver vs. Ward,** 68 Ill.App.3d 236, 24 Ill.Dec. 930, 386 N.E.2d 134 (2d Dist., 1979) was a suit which arose out of an automobile accident. The Circuit Court entered judgment on the verdict in favor of Defendant. Thereafter Plaintiff moved for a mistrial, alleging that the verdict was based, at least in part, on consideration of materials not properly admitted in evidence. Plaintiff's motion was denied, and Plaintiff appealed. The Appellate Court, Guild, P.J. held, inter alia, as follows:

> Neither the trial court nor this court need attempt to delve into the exact effect of unauthorized evidence on a particular juror. ... It is enough that the unauthorized evidence directly relates to issues in the case and may have improperly influenced the verdict. In **Gertz vs. Bass** (1965) 59 Ill.App.2d 180, 185-86, 208 N.E.2d 113, 116, the First District Court of Appeals quoting **Daniels vs. Barker** (1938), 89 N.H. 416, 200 A. 410 reasoned as follows:
>
> "When incompetent evidence which may be prejudicial is received, the verdict is set aside, without proof that

> the jury gave it any weight in reaching the verdict. To require the losing party to prove actual prejudice would place a difficult and unjust burden on him... ."

386 N.E.2d at 139.

The trial judge in this cause, admittedly after the fact, exercised the opportunity afforded him to correct the damage which had already occurred by the submission of improper evidence. This decision of the trial judge was unanimously affirmed by the State Appellate Court and the Illinois Supreme Court. This Honorable Court need not burden itself by entertaining further and needless presentation of this now thrice argued issue.

Finally the opinions of Mr. Justice Frankfurter relative to the granting of Writs of Certiorari in FELA cases must be heeded:

> Mr. Justice FRANKFURTER, dissenting.
>
> In Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 524, 77 S.Ct. 443, I gave my reasons for deeming it an abuse of the Court's discretionary certiorari jurisdiction to make cases arising under the Federal Employers'

Liability Act, 45 U.S.C.A. Section 51 et seq., a class exception to the Court's principle against granting certiorari when all that is involved is the evaluation of evidence. * * *

Congress saw fit to give the state courts jurisdiction of the rights it created by the Federal Employers' Liability Act. Presumably, it had confidence in the state courts for enforcement of these rights. * * * It left adjudications brought in the state courts with the state courts, except in instances applicable generally to the jurisdiction on writ of certiorari, to be exercised, that is, "only where there are special and important reasons therefor." Rule 19 of the Revised Rules of this Court, 28 U.S.C.A.

It cannot be too often repeated. This Court has said again and again that a difference of opinion in weighing evidence is not included among "special and important reasons" for granting certiorari. * * * And so the nine members of the highest tribunal in the land, preoccupied with more than enough cases involving the gravest issues of national importance, are asked to take on the task of making

> an independent study of the record below...the four opinions below, and the briefs of parties, after three courts and ten judges of Ohio have conscientiously dealt with questions that are not specialized questions of federal law and indeed constitute probably the most recurring staple business of the courts throughout the country.
>
> I must respectfully decline to assume this task.
>
> **McBride vs. Toledo Terminal Railroad Company,** Dissent of Mr. Justice Frankfurter, 354 U.S. 517, 518-519, 77 S.Ct. 1398-1399, 1 L.Ed.2d 1534 (1957)

Plaintiff must conclude by expressing wholehearted concurrence with Petitioner's concern with the rights of all parties to a jury determination in an FELA case. The jury's determination, however, must be based upon proper evidence and not prejudicial irrelevancies; Plaintiff merely seeks such a determination. To suggest, as does Defendant in its conclusion, that the granting of a new trial somehow deprives any party of its right to a trial is not accurate. Both Plaintiff and De-

fendant are entitled to a jury determination in an FELA suit, but that jury determination must be based upon competent evidence and not inflammatory innuendos.

CONCLUSION

Defendant-Petitioner has not affirmatively demonstrated that the trial court abused its discretion in granting Plaintiff a new trial. In this case, as is in the overwhelmingly majority of others, the reviewing court should defer to the discretionary determination of the trial judge who is in a better position to observe prejudicial acts or testimony and their effects on the jury. The cause before this Court is rendered even more straightforward by the decision of the trial judge having been affirmed by a unanimous Illinois Appellate Court and the Supreme Court of the State of Illinois.

Respondent respectfully requests that the decision of the Illinois trial judge, and the Appellate Court, and the State Supreme Court be affirmed, and that this Petition for

a Writ of Certiorari be denied.

Respectfully submitted,

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